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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA MATTHEW BURTON,

Defendant and Appellant.

C085517

(Super. Ct. Nos. CM039531,
CM042851)

The trial court declared defendant Joshua Burton incompetent to stand trial and ordered him to a state hospital for treatment. After competence was restored, defendant pleaded no contest to forging a prescription, first degree burglary, and misdemeanor sexual battery. The trial court placed him on probation, but when defendant admitted violating the terms of his probation, the trial court revoked probation and sentenced him to prison.

In his appellant's opening brief, defendant argues the judgment must be reversed because he was not competent to admit a violation of probation or to be sentenced. After the California Supreme Court issued its decision in *People v. Rodas* (2018) 6 Cal.5th 219 (*Rodas*), we asked the parties for supplemental briefing on whether defendant's failure to take antipsychotic medication, standing alone, constituted substantial evidence of incompetence or merely raised a suspicion of incompetence.

Although the trial court received information at the violation of probation hearing that defendant was not taking medication, there was no evidence of a substantial change

in circumstances, and no new evidence casting serious doubt on the validity of the prior competency finding. Because there was no substantial evidence of incompetence at the violation of probation hearing or at the sentencing hearing, defendant has not established reversible error. We will affirm the judgment.

BACKGROUND

The People charged defendant with forging a prescription (Bus. & Prof. Code, § 4324, subd. (a)), first degree burglary (Pen. Code § 459),¹ and assault with intent to commit a felony (§ 220, subd. (a)). It was further alleged that the burglary and assault were committed while defendant was released on bail for the forgery. (§ 12022.1) Shortly after his arraignment for the burglary and assault, defendant's counsel declared a doubt as to defendant's competence and the trial court ordered a section 1368 evaluation.

In a section 1368 report, Clinical Psychologist Mark Streets, Ph.D., opined that defendant was incompetent to stand trial because he did not have a rational understanding of the legal proceedings and his disorganized thoughts and irrational thinking would interfere with his ability to assist counsel. Dr. Streets diagnosed defendant with psychotic disorder and recommended medication to be determined by a psychiatrist. The trial court found defendant was not competent to stand trial and ordered him committed to Napa State Hospital for treatment.

The medical director of Napa State Hospital subsequently certified that defendant was mentally competent. (§ 1372.) The certification report noted defendant had organized thoughts, coherent responses, understood the proceedings, and would be capable of assisting his attorney. The trial court found defendant competent and criminal proceedings were reinstated.

¹ Undesignated statutory references are to the Penal Code.

Defendant pleaded not guilty by reason of insanity and the matter was referred to Dr. Eugene Roeder and Dr. Daisy Switzer for section 1026 reports. Dr. Roeder opined defendant was legally sane when he committed the offenses, even though he was “experiencing symptoms of significant mental disorder.” Defendant refused to be evaluated by Dr. Switzer, who diagnosed him with opiate dependence with possible drug induced psychosis, noting defendant’s goal directed behavior was inconsistent with mental illness. Dr. Switzer said defendant’s denial suggested knowledge of wrongfulness of conduct, and intoxication may have played a role in the offenses. According to Dr. Switzer, defendant was severely substance dependent, and in spite of any secondary diagnosis, which may not exist given that his symptoms seemed to have resolved with sobriety, defendant’s voluntary and continuous ingestion of drugs and alcohol at the time of the offenses would likely preclude a defense of insanity.

The trial court found that defendant was not insane at the time of the offenses. On the same day, however, defense counsel again expressed a doubt concerning defendant’s competence to stand trial, and the trial court ordered another section 1368 evaluation.

In a section 1368 report prepared by Dr. Don Stenbridge, the doctor concluded defendant was competent to stand trial. Although defense counsel was concerned with defendant’s belief that the legal system did not have jurisdiction over him, Dr. Stenbridge said defendant was easily redirected and understood what he needed to do to assist his attorney. Dr. Stenbridge opined that as long as defendant remained on his antipsychotic medication, he would continue to have adequate ability to assist counsel. Dr. Stenbridge added that if defendant discontinued the antipsychotic medication, he would “rapidly decompensate and become floridly psychotic again.”

Defendant pleaded no contest to forging a prescription, first degree burglary, and misdemeanor sexual battery (§ 243.4, subd. (e)(1)) and the trial court placed him on probation. But defendant subsequently admitted violating the terms of his probation.

During a discussion in court about whether defendant should be released pending sentencing, the trial court asked defendant if Behavioral Health had prescribed him certain medications that he needed to take. Defendant said they had not. Defendant said it was his understanding he was not required to be on any medication at that time. It was stated in court that defendant was refusing medication at the jail. The trial court remanded defendant without bail and asked that the jail review defendant's medications to see if they could get defendant on some medication that would help him.

At sentencing, defense counsel argued for imposition of the low term or the midterm based on defendant's mental illness. But defense counsel did not raise a concern about defendant's competence at the time of his plea or at sentencing. The trial court revoked defendant's probation and sentenced him to four years eight months in prison, consisting of the middle term of four years for the burglary conviction, a consecutive one-third the midterm of eight months on the forgery conviction, and a concurrent six months in jail for the misdemeanor sexual battery.

DISCUSSION

Defendant contends the judgment must be reversed because he was not competent to admit a violation of probation or to be sentenced.

A

In *Rodas, supra*, 6 Cal.5th 219, the California Supreme Court explained: "The constitutional guarantee of due process forbids a court from trying or convicting a criminal defendant who is mentally incompetent to stand trial. [Citations.] Section 1367 of the Penal Code, incorporating the applicable constitutional standard, specifies that a person is incompetent to stand trial 'if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.' [Citations.]

"Penal Code section 1368 requires that criminal proceedings be suspended and competence proceedings be commenced if 'a doubt arises in the mind of the judge'

regarding the defendant's competence (*id.*, subd. (a)) and defense counsel concurs (*id.*, subd. (b)). This court has construed that provision, in conformity with the requirements of federal constitutional law, as meaning that an accused has the right 'to a hearing on present sanity if he comes forward with substantial evidence that he is incapable, because of mental illness, of understanding the nature of the proceedings against him or of assisting in his defense.' [Citation.] 'Once such substantial evidence appears, a doubt as to the sanity of the accused exists, no matter how persuasive other evidence -- testimony of prosecution witnesses or the court's own observations of the accused -- may be to the contrary.' [Citation.] As we have explained in more recent cases, substantial evidence for this purpose is evidence 'that raises a reasonable or bona fide doubt' as to competence, and the duty to conduct a competency hearing 'may arise at any time prior to judgment.' [Citations.]

"When a doubt exists as to the defendant's mental competence, the court must appoint an expert or experts to examine the defendant. The issue is then tried to the court or a jury under the procedures set out in Penal Code section 1369. Except as provided in Penal Code section 1368.1 (allowing for probable cause and motion hearings in certain circumstances), all criminal proceedings are to be suspended until the competence question has been determined. (Pen. Code, § 1368, subd. (c).)

"If, after a competency hearing, the defendant is found competent to stand trial, a trial court may rely on that finding unless the court ' "is presented with a substantial change of circumstances or with new evidence" casting a serious doubt on the validity of that finding.' [Citations.]" (*Rodas, supra*, 6 Cal.5th at pp. 230-231.) This rule does not "alter or displace the basic constitutional requirement . . . [that] require[s] the court to suspend criminal proceedings and conduct a competence hearing upon receipt of substantial evidence of incompetence even if other information points toward competence." (*Id.* at p. 234.) Rather, it clarifies "that the duty to suspend is not triggered by information that substantially duplicates evidence already considered at an earlier,

formal inquiry into the defendant's competence; when faced with evidence of relatively minor changes in the defendant's mental state, the court may rely on a prior competency finding rather than convening a new hearing to cover largely the same ground." (*Id.* at pp. 234-235.) This is a "fact-specific" inquiry. (*Id.* at p. 235.)

B

Defendant argues that when the trial court learned at the violation of probation hearing that defendant was not taking medication, the trial court should have realized defendant was likely incompetent and ordered another competency evaluation. We disagree.

The trial court was only obligated to conduct another competency hearing if the court was presented with either a substantial change in circumstances or new evidence " 'casting serious doubt' " on the validity of the prior competency finding. (*Rodas, supra*, 6 Cal.5th at p. 231.) Defendant notes that Dr. Stembridge said as long as defendant remained on his antipsychotic medication, he would have adequate ability to assist counsel, but if defendant discontinued the antipsychotic medication he would "rapidly decompensate and become floridly psychotic again."

But defendant's cessation of antipsychotic medication, standing alone, did not mandate a finding of changed circumstances casting doubt on the validity of the prior competency finding. Unlike the defendant in *Rodas*, whose cessation of antipsychotic medicine coincided with a return of his psychotic symptoms and whose attorney had expressly renewed a doubt concerning his competence (*Rodas, supra*, 6 Cal.5th at pp. 232-233, 235), nothing at the hearing on defendant's admission of the probation violation suggested defendant did not understand the proceeding or was incapable of assisting counsel. (See § 1367, subd. (a)) There is no evidence of a return of his prior symptoms of disorganized thinking or that he was otherwise experiencing the florid psychosis predicted by Dr. Stembridge. On the contrary, defendant was oriented as to time and place and appropriately answered the court's questions concerning his plea.

Cessation of antipsychotic medication, without more, may raise a suspicion concerning competence (see *People v. Deere* (1985) 41 Cal.3d 353, 358, disapproved on another ground in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn.9), but without an actual manifestation of symptoms evidencing the predicted psychosis, it is not substantial evidence of incompetence.

Defendant also claims he was not competent to be sentenced, pointing to information under seal. We have reviewed the record, including the information under seal, and conclude there was no substantial evidence of a changed circumstance or of incompetence at sentencing. As we have noted, defendant's trial counsel, who had previously raised a doubt as to defendant's competence, affirmed there was no reason why judgment and sentence should not then be entered against defendant.

Defendant asserts for the first time in his reply brief that information in his supplemental probation report mandates a different conclusion. We will not consider arguments raised for the first time on reply. (*People v. Duff* (2014) 58 Cal.4th 527, 550, fn. 9.)

DISPOSITION

The judgment is affirmed.

/S/
MAURO, Acting P. J.

We concur:

/S/
DUARTE, J.

/S/
RENNER, J.